

Attorney General Opinions Regarding Local Regulation of Alternative Onsite Septic Systems
November 14, 2012

Op. Va. Att’y Gen. 11-100 (March 2012) (“Lingamfelter”):

Questions:

- “Are the strictures in [§ 15.2-2157] limited to maintenance standards and maintenance requirements....”
- “Does the general language in [§ 15.2-2157(A)] authorize a County to adopt requirements (other than maintenance requirements) in addition to or stricter than those set forth in the Department of Health regulations....”

Lingamfelter at 1.

Holding: A locality may adopt standards and requirements for AOSS that are in addition to or more stringent than those promulgated by the Board provided (i) they don’t relate to maintenance issues and (ii) they “do not function so as to in effect ban use of an [AOSS] where the state regulations would allow for its operation....” Lingamfelter at 4.

Op Va. Att’y Gen. 12-045 (November 2012) (“Martin 2”):

Question: “May localities adopt or apply any ordinance, standard or other requirement to AOSS that is more stringent than, in addition to, or otherwise exceeds the regulations, standards and requirements of the [Dept. of Health], where the failure to satisfy the local ordinance, standard or requirement could result in the denial of the right to install such a system, when sewers or sewerage disposal facilities are unavailable and when the proposed system is of a type that has been approved by the [Dept. of Health] for use in the particular circumstances and conditions in which it is to be operating.” Martin 2 at 1 (emphasis added).

Holding: Under the three circumstances outlined above, “a Virginia locality cannot adopt requirements and standards for AOSS that are in addition to or more stringent than those enacted by the state....” Martin 2 at 1.

Apparent Rule after Martin 2 (at page 5):

Under § 15.2-2157(D): Locality may never adopt maintenance standards and requirements that exceed those of the state (*i.e.*, regardless of the availability of sewers/sewerage facilities).

Under § 15.2-2157(A) & (C): When sewers/sewerage facilities are available to a property, localities may have more stringent/additional non-maintenance standards/requirements than those of the state.

Under § 15.2-2157 (C): When sewers/sewerage facilities are not available to a property, locality may not enact any regulations/standards/requirement (maint. or non-maint.) that exceeds those of the state if the conditions of § 15.2-2157(C) are met.

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Relevant portions of Va. Code § 15.2-2157 are as follows:

A. Any locality may require the installation, maintenance and operation of, regulate and inspect onsite sewage systems or other means of disposing of sewage when sewers or sewerage disposal facilities are not available; without liability to the owner thereof, may prevent the maintenance and operation of onsite sewage systems or such other means of disposing of sewage when they contribute or are likely to contribute to the pollution of public or private water supplies or the contraction or spread of infectious, contagious and dangerous diseases; and may regulate and inspect the disposal of human excreta.

...

C. When sewers or sewerage disposal facilities are not available, a locality shall not prohibit the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

D. A locality shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.

...

Va. Code § 15.2-2157(A), (C) and (D) (emphasis added).

Op. Va. Att’y Gen 10-061 (December 2010) (“Martin 1”):

Question: “[W]hether § 15.2-2157(C) prevents a locality from requiring a developer to obtain a special exception to the zoning ordinance in order to construct a privately-owned alternative onsite sewage system [“AOSS”] under the circumstances contemplated by that subsection.” Martin 1 at 1.

Holding: “[A] Virginia locality cannot require a landowner to obtain a special exception to a local zoning ordinance in order to install an [AOSS] if the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the [AOSS] has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.” Martin 1 at 1.

Rationale: “To require a special exception application for an [AOSS] that meets the conditions set forth in § 15.2-2157(C) effectively would give the local governing body the *option to prohibit* the system, a result not permitted by the subsection.” Martin 1 at 3 (emphasis added).